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No. 82-640

In the Supreme Court of the United States

October Term, 1982

STATE OF KANSAS, ex rel., Perry Murray and Robert T. Stephan,
Appellees,

vs.

HAROLD R. PALMGREN, et al.,
Appellants.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

ALLEN SHELTON
(Counsel of Record)
KENNETH CLARK
CLARK & SHELTON, P.A.
323 North Pomeroy
Hill City, Kansas 67642
Attorneys for Appellants

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Whether the Kansas Open Meetings Act, on its face and as construed by the Kansas Supreme Court, comports with the requirements of the First and Fourteenth Amendments to the Constitution.

2. Whether the lower courts' refusal to allow Appellants to present the defense of "prosecutorial discrimination" denies them rights guaranteed under the Fourteenth Amendment to the Constitution.

PARTIES TO THE PROCEEDINGS

APPELLEES ARE:

Perry Murray, County Attorney of Thomas County, Kansas, and

Robert T. Stephan, Attorney General of Kansas

APPELLANTS ARE:

Harold R. Palmgren

William J. Randall

John A. Renner

Samuel Friesen

Eugene J. Karlin

Lloyd E. Theimer

Harold E. Upchurch

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No.

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vs.

HAROLD R. PALMGREN, et al.,
Appellants.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

The primary issue presented is whether a State statute, as construed by the Kansas Supreme Court, which forbids private discussion of public business by public officials, violates First Amendment rights of free speech and association.

OPINIONS BELOW

The Findings and Conclusions of the state trial court, and its Judgment Form, are not officially reported under Kansas practice. The Opinion of the Kansas Supreme Court is reported at 231 Kan. 524, 646 P.2d 1091. The Findings and Conclusions, Judgment Form, Opinion, and Denial of Motion for Rehearing are set forth in the Appendix.

JURISDICTION

The action below was filed by the Kansas Attorney General and Thomas County Attorney on March 21, 1980, alleging that Appellants, former County Commissioners or Hospital Trustees of Thomas County, Kansas, knowingly violated the Kansas Open Meetings Act, K.S.A. 75-4317 et seq., on eight separate occasions, and seeking civil penalties of $500.00 from each Defendant for each occasion.

The state trial court, rejecting Appellants' contention that KOMA was vague and overbroad, and after refusing to allow Appellants to present any evidence in support of their asserted defense to prosecutorial discrimination, held that Appellants had attended "secret" meetings on three occasions, and fined Appellants. Two of Appellants' co-defendants were found not to have violated the Act. The trial court's decision was rendered August 7, 1981.

The Opinion of the Kansas Supreme Court affirming the trial court, was filed June 11, 1982. The Order of the Kansas Supreme Court denying Appellants' Motion for Rehearing, was filed July 15, 1982. Appellants filed their Notice of Appeal in the Kansas Supreme Court on September 13, 1982.

Jurisdiction to review the decision of the Kansas Supreme Court by direct appeal is conferred on this Court by 27 U.S.C. §1257(2). See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Re Groban*, 352 U.S. 330, 1 L.Ed.2d 376, 77 S.Ct. 510 (1957); *Torcaso v. Watkins*, 367 U.S. 488, 6 L.Ed.2d 982, 81 S.Ct. 1680 (1961); and *Coates v. Cincinnati*, 402 U.S. 611, 29 L.Ed.2d 214, 91 S.Ct. 1686 (1971).

STATUTES INVOLVED

The statutes pertinent to this appeal are contained in the Kansas Open Meetings Act, K.S.A. 75-4317 et seq. The provisions of that Act in effect at the time of the alleged violations, are as follows:

"75-4317. Open meetings declared policy of state. (a) In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.

(b) It is declared hereby to be against the public policy of this state for any such meeting to be adjourned to another time or place in order to subvert the policy of open public meetings as pronounced in subsection (a).

"75-4317a. Meeting defined. As used in this act, 'meeting' means any prearranged gathering or assembly by a majority of a quorum of the membership of a body or agency subject to this fact (sic) for the purpose of discussing the business or affairs of the body or agency.

"75-4318. Meetings of state and subdivisions open to public; exceptions, secret ballots; notice; agenda, cameras, photographic lights, recording devices. (a) Except as otherwise provided by state or federal law or by rules of the house or senate, and except with respect to any impeachment inquiry or other impeachment matter referred to any committee of the house of representatives prior to the report of such committee

to the full house of representatives, all meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public and no binding action by such bodies shall be by secret ballot, but any administrative body that is authorized by law to exercise quasi-judicial functions shall not be required to have open meetings when such body is deliberating matters relating to a decision involving such quasi-judicial functions.

(b) Notice of the date, time and place of any regular or special meeting of a public body designated hereinabove shall be furnished to any person requesting such information, except that:

(1) If notice is requested by petition, the petition shall designate one person to receive notice on behalf of all persons named in the petition, and notice to such person shall constitute notice to all persons named in the petition; and

(2) If notice is furnished to an executive officer of an employees' organization or trade association, such notice shall be deemed to have been furnished to the entire membership of such organization or association.

(c) It shall be the duty of the presiding officer or other person calling the meeting, if the meeting is not called by the presiding officer, to furnish the information required by subsection (b).

(d) Prior to any meeting hereinabove mentioned, any agenda relating to the business to be transacted at such meeting shall be made available to any person requesting said agenda.

(e) The use of cameras, photographic lights and recording devices shall not be prohibited at any meeting mentioned by subsection (a) of this section, but such use shall be subject to reasonable rules designed to insure the orderly conduct of the proceedings at such meeting.

"75-4319. Closed or executive meetings, when; no binding action. (a) Upon formal motion made, seconded and carried, all bodies and agencies subject to this act may recess, but not adjourn, open meetings for closed or executive meetings. Any motion to recess for a closed or executive meeting shall include a statement of (1) the justification for closing the meeting, (2) the subjects to be discussed during the closed or executive meeting and (3) the time and place at which the open meeting shall resume. Such motion, including the required statement, shall be recorded in the minutes of the meeting and shall be maintained as a part of the permanent records of the body or agency. Discussion during the closed or executive meeting shall be limited to those subjects stated in the motion.

(b) No subjects shall be discussed at any closed or executive meeting, except the following: (1) Personnel matters of non-elected personnel;

(2) consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship;

(3) consultations with the representative of the body or agency in employer-employee negotiations;

(4) confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships;

(5) matters relating to actions adversely or favorably affecting a person as a student, patient or resident of a public institution, except that any such person shall have the right to a public hearing if he or she so requests; and

(6) preliminary discussions relating to the acquisition of real property.

(c) No binding action shall be taken during closed or executive recesses, and such recesses shall not be used as a subterfuge to defeat the purposes of this act.

"75-4320. Penalties. (a) Any member of a body or agency subject to this act who knowingly violates any of the provisions of this act or who intentionally fails to furnish information as required by subsection (b) of K.S.A. 75-4318 shall be liable for the payment of a civil penalty in an action brought by the attorney general or county or district attorney, in a sum set by the court of not to exceed five hundred dollars ($500) for each violation. In addition, any binding action which is taken at a meeting not in substantial compliance with the provisions of this act shall be voidable in any action brought by the attorney general or county or district attorney in the district court of the county in which the meeting was held within ten (10) days of the meeting, and the court shall have jurisdiction to issue injunctions or writs of mandamus to enforce the provisions of this act.

(b) Civil penalties sued for and recovered hereunder by the attorney general shall be paid into the state general fund. Civil penalties sued for and recovered hereunder by a county or district attorney shall be paid into the general fund of the county where the proceedings were instigated."

STATEMENT

In 1972, the Kansas Legislature adopted the Kansas Open Meetings Act, a so-called "sunshine" law. In its original form, knowing violations of the Act were punishable as Class C misdemeanors (1972 Session Laws of Kansas, Chap. 319, §4). By the time of the alleged violations by Appellants in November, 1979, the Act had been amended several times, the changes here material being the addition of a definition of "meeting" (K.S.A. 75-4317a), and the punishment for a knowing violation being changed to a "civil penalty" of not to exceed $500.00 for each violation (K.S.A. 75-4320(a)).

Although the Kansas Attorney General had issued 52 opinions construing the Act, and on numerous occasions the Attorney General states in those opinions that public officials had violated the Act, prior to the filing of the instant action against Appellants, the Attorney General had commenced only one action under the Act and did not in that case seek any penalties.

In November, 1979, the time of the alleged violations of the Act, Appellants Randall, Renner and Palmgren were the three County Commissioners of Thomas County, Kansas. The office of County Commissioner is a part-time elective office paying a small salary. Renner and Palmgren were farmers and Randall was in the heating and

air conditioning business. Appellants Upchurch, Theimer, Karlin and Friesen were members of the Board of Trustees of the Thomas County Hospital, a county-owned institution. Trustees are appointed by the Commissioners for definite terms and receive no compensation for their services. By November, 1979, two previous efforts to build a new Thomas County Hospital were thwarted by decisions of the Kansas Supreme Court that various bond and licensing laws had been violated. See, *Pratt v. Board of Thomas County Comm'rs*, 226 Kan. 333, 597 P.2d 664 (1979), and *Thomas County Taxpayers Ass'n v. Finney*, 223 Kan. 434, 573 P.2d 1073 (1978).

Citizens of Thomas County devoted to building a new hospital then determined to build a non-profit hospital and began soliciting donations for that purpose. Appellants enraged those citizens by taking the position that the possibility of remodeling the existing Thomas County Hospital should be investigated. Those citizens then deluged the Attorney General's office with complaints that Appellants were violating the Kansas Open Meetings Act, and a large delegation of those citizens, among them the Thomas County Attorney, went to Topeka to press those complaints with the Attorney General. Although charged with the duty to advise local officials, neither the Attorney General nor County Attorney ever informed Appellants that such complaints were being made, and these officers did not attempt to instruct Appellants as to what constituted a violation of the Act. In fact, the County Attorney had refused to represent the Trustees, disregarding an opinion of the Attorney General that he was obligated to do so without additional compensation.

Responding to this pressure by the citizens favoring a private, non-profit hospital, the Attorney General launched an intensive investigation, sending numerous agents of the

Kansas Bureau of Investigation to Thomas County for that purpose. On March 21, 1980, the Attorney General and County Attorney, filed a Petition alleging that Appellants and two co-defendants had knowingly violated the Kansas Open Meetings Act on eight separate occasions, and seeking civil penalties of $500.00 from each Appellant involved for each alleged violation. Simultaneously, the Attorney General issued a press release to the news media. Subsequently, Appellees filed an Amended Petition (R., Vol. 1, p.73) containing substantially the same allegations.

In both their Answer to the original Petition (R., Vol. 1, p.36), and Answer to Amended Petition (R., Vol. 1, p.179), Appellants asserted that the Kansas Open Meetings Act is unconstitutional as denying them that due process of law guaranteed by the Constitution and that Appellees were seeking to selectively and discriminatorily enforce the Act against Appellants in violation of their rights under the Fourteenth Amendment. Additionally, Appellants filed a Motion to Dismiss (R., Vol. 1, p.99), with supporting Brief (R., Vol. 1, p.100), arguing that the Act is so vague and overbroad as to deny them due process of law, and their rights under the First Amendment, and alternatively arguing that the Act is penal in nature and should be strictly construed in Appellants' favor.

On October 9, 1980, the trial court heard oral arguments on the Motion to Dismiss, and ruled that the Act is penal in nature as to Appellants, but refused to rule on the constitutional issues, or the issues of interpretation. Not until June 15, 1981, the day before trial, did the trial court decline to hold the Act unconstitutional, and at the same time, the trial court held that prosecutorial discrimination is not a defense in Kansas, and instructed Appellants' counsel not to tender any testimony in support of such defense (R., Vol. 3, Transcript of Pretrial Proceedings

of June 15, 1981). The trial court further refused to admit into evidence certain exhibits tendered by Appellants during the trial in support of the defense of prosecutorial discrimination.

In the meantime, the parties proceeded with discovery and several pretrial conferences. The depositions of all of the Defendants, including Appellants, were taken by Appellees. Appellants sought, by a Request for Production (R., Vol. 1, p.40), to inspect certain documents within the control of the Attorney General, in support of their asserted defense of prosecutional discrimination. The trial court granted Appellees' Motion for Protective Orders and refused Appellants access to such documents (R., Vol. 1, p.195). Appellants then filed interrogatories seeking certain statistical information, within the Attorney General's control, in support of the defense of prosecutorial discrimination. Again, the trial court granted Appellees' Motion for Protective Order and refused to compel the Attorney General to supply such information (R., Transcript of Formal Pretrial Proceedings, p.23).

After the trial beginning June 16, 1981, the trial court, despite its earlier ruling that the Kansas Open Meetings Act is penal in nature as applied to Appellants, liberally construed the Act in favor of Appellees and found that Appellants Renner, Randall, Palmgren and Friesen "knowingly" violated the Act on one occasion, and that Appellants Karlin, Theimer and Upchurch "knowingly" violated the Act on three occasions, notwithstanding the trial court's finding that Appellants had not intentionally violated the Act. Each of the Appellants was fined.

Appellants then timely appealed to the Kansas Court of Appeals (R., Vol. 2, p.194). The appeal, on the joint motion of the parties, was transferred to the Kansas Su-

preme Court. After briefs and oral argument, that Court affirmed in an opinion filed June 11, 1982, and now reported at 231 Kan. 524, 646 P.2d 1091. On July 15, 1982, the Court denied Appellants' Motion for Rehearing, without opinion.

THE QUESTIONS ARE SUBSTANTIAL

I. The Courts below erred in holding that the Kansas Open Meetings Act was neither unconstitutionally vague or overbroad, and in liberally construing the Act.

The Kansas Open Meeting Act applies to virtually every local governmental body or agency in the State. Every city council or commission, board of county commissioners, school board, board of township trustees and hospital board, are covered by the Act. Thousands of local board members, many or most of them unpaid, amateurs volunteers, are directly affected. Many States have similar laws.

While the purpose of the Act, providing citizens access to public business, is important, it is generally conceded to have no constitutional underpinnings, and when that purpose, no matter how laudable, conflicts with a public official's rights to free speech and assembly, and denies him due process of law, the Act must yield.

a. The Kansas Open Meetings Act, as construed by the Courts below, is overbroad and infringes on Appellants' rights under the First and Fourteenth Amendments.

Appellants' argument below on overbreadth was contingent. That is, Appellants conceded that if the Kansas

courts would construe the Act to require only those "meetings for the conduct of the affairs of, and the transaction of business by" the governmental body in question, be open to the public, as Appellants urged and K.S.A. 75-4317 and 75-4318 specifically state, then the Act is not overbroad. Appellees consistently argued that the Act should be liberally construed so that all "meetings", that is, all prearranged gatherings by a majority of a quorum of a public body for the purpose of mere *discussion* of public business or affairs, must be open to the public, whether governmental affairs are conducted or governmental business transacted. In other words, the plain requirement of K.S.A. 75-4317 and 75-4318 that such affairs be conducted and such business transacted, should be ignored.

The trial court, even though it had held the Act to be penal in nature as applied to Appellants (R., Vol. 1, p.193), adopted the liberal construction urged by Appellees, and found that the State need only prove, and had only proved, prearranged gatherings by Appellants for the purpose of *discussing* business or affairs on the three occasions in question (R., Vol. 2, pp.185, 186). The trial court did *not* find governmental affairs were conducted and governmental business transacted on any of the three occasions.

The Kansas Supreme Court disposed of Appellants' overbreadth argument in one paragraph, which reads as follows:

> "The challenge for overbreadth can be easily dismissed. Appellants argue the KOMA has a potential inhibiting effect on the 'rights of public officials to assemble and discuss public affairs.' It is urged citizens have the right to unfettered discussion of governmental affairs in private while retaining anonymity. Appellants' claim reveals a basic misconception

regarding the nature of a public official's position. The First Amendment does indeed protect private discussions of governmental affairs among citizens. *Everything changes, however, when a person is elected to public office.* Elected officials are supposed to represent their constituents. In order for those constituents to determine whether this is in fact the case they need to know how their representative has *acted* on matters of public concern. Democracy is threatened when public *decisions* are made in private. Elected officials have no constitutional right to *conduct* governmental affairs behind closed doors. Their duty is to inform the electorate, not hide from it. *The KOMA places no constraints on purely private discussions by public officials. It regulates only the conduct of public business.* As such the KOMA is not unconstitutionally overbroad." (231 Kan. at pp.533-534, App. C, p.27a; emphasis supplied.)

Analyzing the above reasons in reverse order, it may be true, as the Kansas Supreme Court has held on other occasions,[1] that a statute which is facially overbroad may be authoritatively construed and restricted to cover only conduct which is not constitutionally protected. On its face, the Court did authoritatively and restrictively interpret the Act as regulating only the *conduct* of public business, and as prohibiting the making of public *decisions* in private and the *conduct* of governmental affairs behind closed doors. However, had that restrictive interpretation in fact been applied, this case would have been reversed, for, as above stated, the trial court had held that Appellees need show, and had shown, only that a prearranged *dis-*

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1. See, e.g., *State v. Huffman*, 228 Kan. 186, 192, 612 P.2d 630 (1980).

cussion of public business or affairs had occurred, and the trial court did not find that governmental affairs were conducted, or public business transacted, on any of the three occasions in question (R., Vol. 2, p.183). However, Appellants' convictions were affirmed because the Kansas Supreme Court, after leaving the overbreadth question, in fact interpreted the Act as prohibiting the mere private discussion, as well as the conduct or transaction, of public business by public officials. Syllabus 8 of the Court's opinion read as follows:

> "8. PUBLIC OFFICERS AND EMPLOYEES—Kansas Open Meetings Act. All prearranged gatherings by a majority of a quorum of legislative and administrative bodies, agencies of the state, political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public when the purpose of the gathering is to *discuss, conduct or transact* the business or affairs of the body or agency." (231 Kan. at p.524, App. C, p.13a; emphasis supplied.)

Thus, the Kansas Supreme Court has authoritatively, but not restrictively, interpreted the Act to deny Appellants the right to merely discuss governmental business in private among themselves. The Court, while conceding that the First Amendment does indeed protect private discussions of governmental affairs among citizens, would justify denying this same protection to Appellants because ". . . Everything changes, however, when a person is elected to public office." Significantly, the Kansas Supreme Court cites no authority for this proposition. It is well established that a person does not forfeit or

diminish his constitutional rights by election or appointment to public office or by accepting public employment.[2]

Legislation is unconstitutionally broad where it is susceptible of application to those freedoms guaranteed by the First Amendment.[3] This Court has held that in determining whether legislation is overbroad, it must balance the governmental interests sought to be advanced by the State against threatened First Amendment freedoms.[4] However, even though the governmental purpose is legitimate and substantial, such purpose cannot be pursued by means which stifle fundamental liberties when the end can

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2. See, e.g., *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Torcaso v. Watkins*, 367 U.S. 488, 6 L.Ed.2d 982, 81 S.Ct. 1680 (1961); *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967); *Abood v. Detroit Board of Education*, 431 U.S. 209, 52 L.Ed.2d 261, 97 S.Ct. 1782 (1977); *Givhan v. Western Line Consolid. Sch. Dist.*, 439 U.S. 410, 58 L.Ed.2d 619, 99 S.Ct. 693 (1979). In *Bond v. Floyd*, 385 U.S. 116, 17 L.Ed.2d 235, 87 S.Ct. 339 (1966), this Court rejected the view that a State may curtail the First Amendment rights of one of its legislators to a greater degree than it might those of a private citizen. (385 U.S. at pp.132-133.) This Court held: ". . . while the State has an interest in requiring its legislators to swear to a belief in constitutional processes of government, surely the oath gives it no interest in limiting its legislators' capacity to discuss their views of local or national policy." (385 U.S. at p.135.) This Court held, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 55 L.Ed.2d 707, 98 S.Ct. 1407 (1978), citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 33 L.Ed.2d 212, 92 S.Ct. 2286 (1972), that: "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." (435 U.S. at pp.784-785.)

3. See, e.g., *Coates v. Cincinnati*, 402 U.S. 611, 29 L.Ed.2d 214, 91 S.Ct. 1686 (1971); *Grayned v. Rockford*, 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972); *Lewis v. New Orleans*, 415 U.S. 130, 39 L.Ed.2d 214, 94 S.Ct. 970 (1974).

4. *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967); *Colten v. Kentucky*, 407 U.S. 104, 32 L.Ed.2d 584, 92 S.Ct. 1953 (1972); *Grayned v. Rockford*, 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972); *Procunier v. Martinez*, 416 U.S. 396, 40 L.Ed.2d 224, 94 S.Ct. 1800 (1974); *Erznoznik v. Jacksonville*, 422 U.S. 205, 45 L.Ed.2d 125, 95 S.Ct. 2268 (1975).

be more narrowly achieved.[5] Here the Kansas Supreme Court stated the interests sought to be advanced as granting the public the right to know how their representatives have *acted* on matters of public concern, and preventing public *decisions* from being made and governmental affairs *conducted* in private. (231 Kan. at p.534, App. C, p.27a.) However, those legitimate ends could have been achieved by construing the Act as prohibiting only the conduct of governmental affairs and transaction of governmental business in private, without infringing on Appellants' rights to privately discuss such business and affairs.

Here the State concedes that it cannot constitutionally forbid its citizens to assemble and privately discuss public business and affairs. May the State do so when those citizens happen to be public officials? This Court has held that a public employee or officer may advocate the forcible overthrow of the government, so long as he takes no action to that end.[6] If the State may not punish a public official for advocating its forcible overthrow, may it constitutionally punish Appellants for merely discussing public affairs or business in private among themselves?

b. The Kansas Open Meetings Act is so vague and indefinite as to deny Appellants due process of law as guaranteed by the Fourteenth Amendment.

This Court has stated at least three rationales for the doctrine that a vague statute denies due process: (1) such a statute does not give the citizen fair notice or warning

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5. *Shelton v. Tucker*, 364 U.S. 479, 488, 5 L.Ed.2d 231, 237, 81 S.Ct. 247 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967).

6. See, e.g., *Yates v. United States*, 354 U.S. 298, 1 L.Ed.2d 1356, 77 S.Ct. 1064 (1957); *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967).

as to what conduct is expected or prohibited;[7] (2) certainty is required to guide judges and jurors as to what is prohibited and what is not in each particular case;[8] and (3) vagueness may permit an arbitrary and discriminatory enforcement of the law.[9] When the statute in question is penal in nature, the "void for vagueness" doctrine applies with special force.[10]

If the statute in question threatens or potentially inhibits the exercise of First Amendment freedoms, stricter standards of permissible vagueness apply,[11] and government may regulate in this area only with "narrow speci-

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7. See, e.g., *Connally v. General Construction Co.*, 269 U.S. 385, 70 L.Ed. 322, 46 S.Ct. 126 (1926); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Lanzetta v. Washington*, 405 U.S. 313, 31 L.Ed.2d 258, 92 S.Ct. 993 (1972); *Colautti v. Franklin*, 439 U.S. 379, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979).

8. See, e.g., *Musser v. Utah*, 333 U.S. 95, 92 L.Ed. 562, 68 S.Ct. 397 (1948); *Bouie v. Columbia*, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964); *Giaccio v. Pennsylvania*, 382 U.S. 399, 15 L.Ed.2d 447, 86 S.Ct. 518 (1966).

9. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 31 L.Ed.2d 110, 92 S.Ct. 839 (1972); *Smith v. Goguen*, 415 U.S. 566, 39 L.Ed.2d 605, 94 S.Ct. 1242 (1974); *Colautti v. Franklin*, 439 U.S. 379, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979).

10. See, e.g., *Winters v. New York*, 333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665 (1948). The same strict standard applies whether the penalties are criminal or civil. *Champlin Refining Co. v. Corporation Com.*, 286 U.S. 210, 76 L.Ed. 1062, 52 S.Ct. 559, 86 A.L.R. 403 (1932); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Giaccio v. Pennsylvania*, 382 U.S. 399, 15 L.Ed.2d 447, 86 S.Ct. 518 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967).

11. See, e.g., *Scull v. Commonwealth of Virginia*, 359 U.S. 344, 3 L.Ed.2d 865, 79 S.Ct. 838 (1959); *Smith v. California*, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215 (1959); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Ashton v. Kentucky*, 384 U.S. 195, 16 L.Ed.2d 469, 86 S.Ct. 1407 (1966); *Colautti v. Franklin*, 439 U.S. 379, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979).

ficity."[12] Also, when First Amendment freedoms are involved, this Court will permit a defendant to raise the issue of a statute's vagueness or overbreadth as applied to other persons and situations not before the Court,[13] and accordingly, this Court considers purely hypothetical applications of a challenged statute in determining its vagueness or overbreadth.[14]

In the present case, the trial court expressed the rather novel view that it would not be appropriate for a trial judge to declare the Act unconstitutional (R., Transcript of Pretrial Proceedings, June 15, 1981, at p.10). Nonetheless, the trial court harbored grave doubts that the Act was sufficiently certain to pass constitutional muster:

> "The editorial writers and the legislators hold up the Open Meetings Act as an absolutely necessary law for the governing of the public's business and maintain that it is the only way to enforce the right of the public to know what their public servants are doing when they're conducting the public's business. I

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12. See, e.g., *N.A.A.C.P. v. Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 48 L.Ed.2d 243, 96 S.Ct. 1755 (1976).

13. See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 31 L.Ed.2d 408, 92 S.Ct. 1103 (1972); *N.A.A.C.P. v. Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963); *Grayned v. Rockford*, 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972); *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973); *Dombrowski v. Pfister*, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965); *Freedman v. Maryland*, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965); *Bigelow v. Virginia*, 421 U.S. 809, 44 L.Ed.2d 600, 95 S.Ct. 2222 (1975).

14. See, e.g., *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 31 L.Ed.2d 110, 92 S.Ct. 839 (1972); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 48 L.Ed.2d 243, 96 S.Ct. 1755 (1976); *Colautti v. Franklin*, 439 U.S. 379, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979); *Baggett v. Bullitt*, 377 U.S. 360, 12 L.Ed.2d 377, 84 S.Ct. 1316 (1964).

> don't believe there's any of us lawyers, public servants, judges, who would disagree *except when we run into the problems as has been very accurately described in the course of argument. There have been as many questions asked for which we would all like to have clear definitive answers. They do not seem to be available, at least to the people in this case.*" (Transcript of Pretrial Proceedings, June 15, 1981, at p.9.)

The "problems" and "questions" mentioned by the trial court are those raised by the parties as to the meaning of the Act. If, as the trial court commented, there are no answers to those questions and problems, it must follow that the Act is unconstitutionally vague.

At the time of Appellants' interrogatories, various Attorneys General had found it necessary to issue 52 opinions as to the meaning of the Act. They have not always been consistent as to how the Act should be interpreted.

The Kansas Supreme Court, in stating that the average person possessing ordinary common sense can understand the Act, cited Smoot and Clothier, *Open Meetings Profile: The Prosecutor's View*, 20 Washburn L.J. 241 (1981). However, in that article, Smoot and Clothier noted that the Attorney General is asked to opine "almost daily" about some aspect of the Act,[15] that ". . . the Act is wrought with ambiguities . . .",[16] that the Act has "weaknesses" and "lacks clarity",[17] and possesses "numerous problems of interpretation."[18] It is noteworthy that Mr. Smoot is a deputy Attorney General.

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15. 20 Washburn L.J. at p.242.
16. 20 Washburn L.J. at p.243.
17. 20 Washburn L.J. at p.257.
18. 20 Washburn L.J. at p.285.

The Act is vague as to the basic question of what gatherings of public officials must be open to the public. Appellants consistently have argued that the Act does not require all prearranged discussions by public officials of governmental affairs or business to be open to the public. Appellants pointed out that although the legislature, in 1977, defined "meeting" as a prearranged gathering or assembly of a majority of a quorum of the membership of a body or agency subject to the Act, for the purpose of discussing governmental affairs or business,[19] it did not require that such discussions be open to the public. Rather, the legislature required that only those meetings (discussions) ". . . for the conduct of the affairs of, *and* transaction of business by, . . . shall be open to the public. . ."[20] If the legislature had intended to require prearranged discussions to be open to the public, it would have simply required all "meetings" to be open to the public. It did not see fit to do so, and, in fact, when K.S.A. 75-4318 was amended in 1978, the legislature left intact the requirement of that section that only meetings for the conduct of the affairs and transaction of business be open to the public.[21]

Appellees consistently argued that to carry out the broad purposes of the Act, it should be liberally construed to require that all prearranged discussions of governmental affairs or business must be open to the public. In other words, the phrase ". . . for the conduct of the affairs of, and transaction of business of . . ." in K.S.A. 75-4318

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19. K.S.A. 75-4317a, quoted above.

20. K.S.A. 75-4318, quoted above.

21. Justice Fromme, in dissent, would interpret the Act in the manner urged by Appellants, and noted that prior to this case, the Court had never decided if all gatherings were subject to the penalties of the Act. See 231 Kan. at pp.541-542, App. C., pp.36a-39a.

should be excised from the Act and ignored. However, the Attorney General has conceded, in his Opinion No. 79-200, that the language of K.S.A. 75-4318 does suggest the more restrictive interpretation urged by Appellants. He further concedes, in that same Opinion, that the difference in language in K.S.A. 75-4317a and K.S.A. 75-4318, ". . . creates a good deal of confusion and mandates interpretation."

As we have seen, the Kansas Supreme Court adopted a broad, liberal construction of the Act and concluded that all prearranged gatherings for the purpose of discussing, conducting *or* transacting governmental business or affairs, must be open to the public.

Such a construction may impart certainty to the Act in future cases, but it creates the overbreadth problem above discussed, and cannot constitutionally be applied in this same case to Appellants.[22] Application of a broaden-

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22. In *Stromberg v. California*, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532, 73 A.L.R. 1484 (1931), this Court held it constitutionally impermissible for the California Supreme Court after the case had been tried, to excise vague and overbroad language from the statute and apply it to the appealing party when it was not so narrowed at the time of her conviction. This Court, in *Ashton v. Kentucky*, 384 U.S. 195, 198, 16 L.Ed.2d 469, 471-472, 86 S.Ct. 1407 (1966), and *Smith v. Goguen*, 415 U.S. 566, 580, 39 L.Ed.2d 605, 616, 94 S.Ct. 1242 (1974), noted the problems presented by a court applying a limiting construction in the very case in which a defendant has been convicted under a previously unnarrowed statute, and in *Bouie v. Columbia*, 378 U.S. 347, 352-353, 12 L.Ed.2d 894, 899, 84 S.Ct. 1697 (1964), this Court held:

> ". . . where *vague statutes* are concerned, it has been pointed out that the vice in such an enactment *cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute,'* for 'the objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. *The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court,* though it might be cured for the future by an authoritative judicial gloss. . .' Freund, The Supreme Court and Civil Liberties, 4 Vand L Rev 533, 541 (1951). See Amsterdam, Note, 109 U Pa L Rev 67, 73-74, n 34." (Emphasis supplied.)

ing interpretation in the same case is even more constitutionally infirm.[23]

The definition of "meeting" contained in K.S.A. 75-4317a also contains uncertainties. It is not clear, for instance, whether the gathering or assembly, or purpose of discussing, or both, must be prearranged. The Act does not specify to what degree, if any, a public officer must participate in, or at least have knowledge of, such prearrangement, to be held liable under the Act. Nor does the Act state *whose* purpose of discussion governs: that of the person prearranging the gathering or the public officers attending. Must all of the public officers attending the prearranged gathering possess the requisite purpose, or is it sufficient if a majority or even one, intends to discuss public business? These issues were addressed to both Courts below and neither even discussed them.

c. The Courts below erred in liberally construing the Act in favor of the State, and in indulging in a strong presumption in favor of the constitutionality of the Act.

Appellants concede that normally this Court is not concerned with the interpretation given a state statute by the highest court of that State. But when this Court has enunciated principles mandated by the Constitution for determination of the constitutional validity of a statute, the state courts are not free to disregard those principles.

Here the trial court held that the Act, as applied to Appellants, is penal in nature, but failed to strictly construe the statute. The Kansas Supreme Court conceded, in effect, the penal nature of the Act and noted that it had

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23. *Bouie v. Columbia*, 378 U.S. 347, 352-353, 12 L.Ed.2d 894, 899-900, 84 S.Ct. 1697 (1964).

long adhered to the rule that a penal statute should be strictly construed. (231 Kan. at p.530, App. C, p.21a.) The Court further noted the rule that where First Amendment rights are involved, stricter standards of permissible statutory vagueness apply. (231 Kan. at p.533, App. C, p.26a.) Nonetheless, the Court held the Act is entitled to a broad, liberal interpretation in favor of the State, because the Act was enacted for the public benefit or protection. (Syllabus 4, App. C, p.12a, and 231 Kan. at pp. 530-531, App. C, pp.21a-23a.)

Appellants suggest that the exception stated by the Court below would engulf the rule, for *every* statute, criminal or civil, is enacted for the public benefit or protection. Thus, under the exception stated by the Kansas Supreme Court, no statute, even a criminal statute or one infringing on First Amendment freedoms, would ever be strictly construed against the State.

This Court has recognized no such exception. To the contrary, this Court has held that the rule of strict construction (called the rule of lenity) is rooted in fundamental principles of due process, and is not merely a convenient maxim of statutory construction.[24] Thus, the refusal of the Kansas Supreme Court to strictly construe the Act in Appellants' favor is in itself violative of due process.

In the course of its opinion, the Kansas Supreme Court stated the following rules to be applied in the present case:

> "Let us first consider the rules of construction on the constitutional challenge of a statute. We have stated on innumerable occasions the constitutionality of a statute is presumed; all doubts must be resolved in favor of its validity, and before a statute may be

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24. *Dunn v. United States*, 442 U.S. 100, 112, 60 L.Ed.2d 743, 754, 99 S.Ct. 2190 (1979).

stricken it must clearly appear there is a constitutional violation. We have gone on to say, in determining constitutionality, it is the court's duty to uphold the statute under attack rather than defeat it. If there is any reasonable way to construe the statute as constitutionally valid, it should be done. Statutes are not stricken unless the infringement of the superior law is clear beyond a reasonable doubt. *Von Ruden v. Miller*, 231 Kan. 1, 642 P.2d 91 (1982); *In re Brooks*, 228 Kan. 541, 543, 618 P.2d 814 (1980); *State v. Huffman*, 228 Kan. 186, 189, 612 P.2d 630 (1980); *Colby Distributing Co. v. Lennen*, 227 Kan. 179, 186-87, 606 P.2d 102 (1980); *State v. Meinert*, 225 Kan. 816, 817, 594 P.2d 232 (1979)." (231 Kan. at p.532, App. C, p.24a.)

No doubt the above rules are correct, except when First Amendment rights are involved. A statute which appears to restrict First Amendment freedoms does not have as strong a presumption of validity, the State has the burden of establishing that it has a compelling interest justifying restriction of those freedoms and it is not enough that the State show a rational relationship of the statute to a colorable state interest.[25] Here Appellees made no showing of such compelling interest, and the Courts below did not impose that burden on them.

II. The Courts below erred in refusing to permit Appellants to present the defense of prosecutorial discrimination.

As above stated, the trial court held, on the day before trial, the equal protection defense of prosecutorial discrimination was not recognized in Kansas, and instructed Ap-

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25. See, e.g., *Minielly v. State*, 242 Or. 490, 411 P.2d 69, 28 A.L.R.3d 705, 714-715 (1966) and cases of this Court therein cited.

pellants that they could not offer any testimony or exhibits in support of that defense. Consistent with that ruling, the trial court had previously refused to permit Appellants discovery of certain statistical information in support of the defense.

This Court has clearly held that the equal protection clause of the Fourteenth Amendment does prohibit enforcement of any law in an invidious and discriminatory fashion.[26] To establish the defense, it is generally held that a defendant must show: (1) that others similarly situated are generally not prosecuted for conduct similar to that for which the defendant is prosecuted; (2) that defendant has been intentionally singled out for prosecution; and (3) that such selection is based on an invidious or arbitrary criterion.[27]

The Kansas Supreme Court conceded that the trial court had erred in its ruling that the defense of discriminatory prosecution was not available to Appellants:

> "Clearly a constitutionally based claim such as discriminatory prosecution should always be available to a defendant. To hold, as the trial court did here, that separation of powers prohibits a defendant from asserting this defense is to ignore the very constitution from which this doctrine is derived." (231 Kan. at p.529, App. C, p.20a.)

Given this ruling, the Court should have reversed and granted Appellants the opportunity to prove the defense at

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26. *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886); *Ah Sin v. Wittman*, 198 U.S. 500, 49 L.Ed. 1142, 25 S.Ct. 756 (1905); *Two Guys v. McGinley*, 366 U.S. 582, 6 L.Ed.2d 551, 81 S.Ct. 1135 (1961); *Oyler v. Boles*, 368 U.S. 448, 7 L.Ed.2d 446, 82 S.Ct. 501 (1962); *Cameron v. Johnson*, 390 U.S. 611, 20 L.Ed.2d 182, 88 S.Ct. 1335 (1968).

27. Annotation at 95 A.L.R.3d 280, 287.

a new trial. The Court did not do so. Instead, it held that the trial court's ruling, though erroneous, was nonetheless correct because it found Appellants had failed to show that "colorable entitlement" to the defense which some courts have held must be demonstrated before *discovery* is allowed.[28] The Court blithely ignored the fact that the trial court not only refused discovery, but also refused to allow Appellants to present any evidence at trial in support of the defense of prosecutorial discrimination.

Even assuming that Appellants were not entitled to discovery,[29] the Kansas Supreme Court does not, and cannot, explain how this would justify denying Appellants the right to present testimony and exhibits at the *trial* in support of the defense. The prosecutorial discrimination defense is hollow indeed if the Court, while conceding Appellants' rights to assert the defense, may deny them any opportunity to prove it.

The issue is not whether Appellants could have established the defense. Rather, the issue is whether the refusal of the Courts below to grant them the opportunity to do so denies Appellants equal protection of the law.

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28. 231 Kan. at p.529, App. C, p.20a.)

29. Appellants did demonstrate "colorable entitlement" to the defense (R., Vol. 2, p.64) even though neither the trial court nor Appellees ever indicated that such colorable entitlement was required.

CONCLUSION

For the reasons stated above, the issues here presented are substantial and probable jurisdiction should be noted.

Respectfully submitted,

ALLEN SHELTON
KENNETH CLARK
CLARK & SHELTON, P.A.
323 North Pomeroy
Hill City, Kansas 67642
Attorney for Appellants